U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

April 8, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Joseph Otting
Comptroller
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429-0002

RE: Docket ID OCC-2018-0008; RIN 1557-AE-34, 3064-AF22; Reform of the Community Reinvestment Act

Dear Comptroller Otting and Chairman McWilliams:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation's (FDIC) joint proposed rule on the Community Reinvestment Act (CRA). While Advocacy commends the agencies for taking steps to clarify the CRA, there are aspects of the proposal that may be burdensome to small entities. Advocacy encourages the agencies to consider less burdensome alternatives for small entities.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[1] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] gives small entities a

[1] 5 U.S.C. § 601 et seq.
[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[3] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[4] Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[5]

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held conference calls with the Independent Community Bankers of America and the American Bankers Association about this proposal. Both organizations represent small banks that are subject to the CRA. Advocacy's comments reflect the feedback that it received from the organizations about the potential impact of the proposal on their small members.

Community Reinvestment Act

Congress enacted the Community Reinvestment Act (CRA) in 1977 to address fairness and access to housing and credit. The purpose of the CRA is to encourage depository institutions to meet the credit needs of the communities in which they operate, including low- and moderate-income neighborhoods. The CRA requires federal regulators (OCC, FDIC and the Federal Reserve) to assess how well a bank fulfills its obligations to the communities that it serves.[6]

Over the years, the agencies have issued revised CRA regulations. They have also attempted to clarify the CRA regulations. The last major revisions to the regulations were made in 1995. However, the agencies have continued to engage with the public and stakeholders on the CRA. For example, the agencies conducted a review of the CRA in 2014 and submitted a report to Congress on the issue in 2017. In 2018, the agencies issued an advance notice of proposed rulemaking on the CRA.[7]

The Proposed Rule

On January 9, 2020, the OCC and the FDIC published a joint proposed rule in the Federal Register titled Community Reinvestment Act.[8] The agencies propose to strengthen the CRA

3 Small Business Jobs Act of 2010 (PL 111-240) § 1601.
[4] Id.
[5] 5 U.S.C. § 601 note 7.
[6] 85 Federal Register 1204 at 1205 (January 9, 2020).
[7] Id.
[8] 85 Fed. Reg. 1204.

regulatory framework to better achieve the underlying statutory purpose of encouraging banks to help serve their communities by making the framework more objective, transparent, consistent, and easy to understand. To accomplish these goals, the proposal would:

- clarify which activities qualify for CRA credit;
- update where activities count for CRA credit;
- create a more objective method for measuring CRA performance; and
- provide for more transparent, consistent, and timely CRA-related data collection, recordkeeping, and reporting.

The agencies contend that the proposal would establish a regulatory framework with the goal to encourage banks to conduct more CRA activities and to serve more of their communities, including those areas with the greatest need for economic development, investment, and financing needs, such as urban and rural areas and opportunity zones, that may be underserved by the current regulations.

The proposal would change the definition of "small bank" and would allow small banks to be examined under the small bank performance standards, unless the banks opt into being evaluated under the general performance standards. A small bank may choose to opt in and opt out one time.[9] The proposal also allows for a delayed compliance date for small banks. The proposed rule will impact 722 OCC-regulated small banks[10] and 2,665 FDIC-regulated small banks[11] as defined by the Small Business Administration's size standards.

The Proposal Is Costly and the Agencies Should Consider Less Costly Alternatives.

Advocacy appreciates the agencies' attempt to clarify and strengthen the CRA regulations. However, Advocacy is concerned that the proposal may be burdensome for small financial institutions. In the RFA section of the preamble, the agencies published separate initial regulatory flexibility analyses (IRFAs) pursuant to section 603 of the RFA. In the respective IRFAs, the agencies acknowledge that the proposed rule may be costly for small banks.[12] One of the most important aspects of an IRFA is the consideration of less burdensome alternatives.[13] Advocacy asserts that there may be less burdensome alternatives that the agencies should consider under their obligation to comply with the RFA.

The Small Bank Definition Should Be Consistent with the Small Business Administration's Size Standard.

In the proposal, the agencies are revising the definition of a small bank. Under the current CRA regulations, a small bank is defined as a bank that, as of December 31 of the prior two calendar years, had assets of less than $1.284 billion; an intermediate small bank is defined as one that had assets of at least $321 million dollars. Under the proposal, a small bank is defined as one

[9] Id. at 1226.
[10] 85 Fed. Reg. at 1235.
[11] Id. at 1236.
[12] Id. at 1235-1237.
[13] For the full requirements of an IRFA, see 5 USC §603.

with assets of $500 million or less in each of the previous four calendar years.[14] This definition would be used to determine whether a small bank may be eligible to use the small business performance standards.

This definition is problematic. It is not consistent with SBA's definition for a small bank. Unless authorized by statute, a federal agency must use SBA's size standard unless a different standard is approved by the Administrator and published for notice and comment.[15] SBA defines a small bank as having less than $600 million in assets. Using a different definition will exclude a significant number of small banks. For example, the latest FDIC report says there are 205 institutions with assets greater than $500 million but less than $600 million; this amounts to 5.2 percent of all smalls.[16]

The compliance costs estimates for the OCC-regulated banks are difficult to ascertain because it appears as though there may be an error in the IRFA. The OCC states that the proposed rule would affect 749 of the 782 OCC-regulated small entities, and that, for banks under the small bank standards requirements of the proposal, the economic impact would be $36 million on 72 small entities under the small bank standards, or $500,000 per bank. The OCC goes on to state that under the general standards, the impact would be $375 million on 738 small entities, which would average out to $508,130.[17] However, the 72 small entities statement is inconsistent with the earlier conclusion that the proposal would affect 749 of the 782 small entities that the OCC supervises.[18] If Advocacy assumes that the OCC meant 782 small banks rather than 72, the average cost per bank would be $46,035. This estimate is similar to the FDIC's cost estimate. The FDIC estimates the impact to be $93,000 for small banks that are subject to the small bank procedures and $665,802 for small entities that are subject to the new performance standards.[19]

The difference in compliance costs for a small bank that cannot use the small bank procedures is astronomical. For OCC supervised banks, a small bank with $600 million in assets would incur approximately ten times as much as a bank with less than $500 million in assets. Similarly, a FDIC-supervised small bank with assets of $600 million would incur approximately seven times as much as a bank with less than $500 million in assets.

Not only will a bank with $600 million in assets be required to incur seven to ten times more in compliance costs, the bank will be using the same performance standards as a large bank such as Wells Fargo. Wells Fargo has $1.9 trillion in assets.[20] That is more than 3,000 times the assets of a small bank by SBA standards.

Congress enacted the RFA because federal regulatory and reporting requirements were found to impose unnecessary and disproportionately burdensome demands upon small entities. Such regulations have a negative impact on competition. The RFA establishes the principle that

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[14] 85 Fed. Reg. at 1224.
[15] See, 15 USC § 632 (a)(2)(c).
[16] FDIC Statistics on Depository Institutions (data as of December 31, 2019).
[17] 85 Fed. Reg. 1235.
[18] Id.
[19] 85 Fed. Reg. at 1237.
[20] Wells Fargo Today, Fourth Quarter 2019, page 2.

agencies should endeavor to fit regulatory and informational requirements to the scale of the entities subjected to the regulation. Defining a small bank in a way that requires a small bank to incur the same regulatory burden as a bank with 3,000 times more assets is inconsistent with that goal.[21]

Small banks have a number of challenges. Especially in times of economic difficulties, steps should be taken to reduce the burden on small banks and encourage them to invest in their communities. Increasing the range for the definition of small bank will allow all SBA-defined small banks to qualify for the small bank procedures and reduce the burden of complying with the CRA.

Small Banks Should Be Allowed to Opt In and Opt Out of the General Standards.

The proposal would allow a small bank to opt into the general standards and then opt out of the standards one time. The agencies question whether small banks should be allowed to opt in and out more than one time.[22] Advocacy asserts that there should not be a limit on the number of times that a small bank can opt in and out of the general standard. It will allow small banks more flexibility in deciding the best strategy for their business plans.

Qualifying Loans for Small Banks Should Be Credited at 100 Percent Regardless of the Amount of Time that the Bank Holds the Loan.

The proposed rule provides that a bank will only receive credit for 25 percent of the origination value for loans sold within 90 days of origination. [23] If a loan is held for greater than 90 days, the bank receives 100 percent credit. If the loan is held for less than 90 days, the bank only receives 25 percent credit. This policy may be unfair to small banks.

According to the Independent Community Bankers of America, small banks may not hold loans on their books for longer than 90 days. Advocacy asserts that small banks should not be punished because their business plan requires them to sell loans in less than 90 days. Indeed, allowing small banks to have 100 percent credit regardless of the length of time they hold the loan may incentivize them to provide additional service to their communities.

Small Banks Should Be Exempt from Requirement Associated with the Designation of Deposit-Based Assessment Areas.

Under the proposal, small banks would be required to collect and maintain information on depositors necessary for the designation of deposit-based assessment areas. To limit the recordkeeping burdens for small banks, the agencies are considering alternatives for small bank data collection, including a full exemption from any recordkeeping requirements. In the

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[21] Prior to this proposal, the agencies defined small as a bank with consolidated assets of less than $1.284 billion. By statute, the RFA applies to the small entities as defined by the RFA. As such, Advocacy's stakeholders are banks with less than $600 million in assets. However, Advocacy questions the equity of requiring a bank with $1.284 billion in assets to comply with the same procedures as a bank with trillions of dollars in assets.

[22] 85 Fed. Reg. at 1226.

[23] Id. at 1214.

proposal, the agencies state that they could exempt a small bank from any recordkeeping requirement associated with the designation of deposit-based assessment areas. That particular requirement is designed to capture non-traditional business models of internet banks or other banks that have one or a few physical locations but operate on a national basis.[24]

Advocacy asserts that this requirement will be expensive for small banks to implement. It will require small banks to build a new collection and incur additional paperwork burden. Small rural banks may have very few customers that are not in the area. Small community banks also may not have an internet presence. As such, small banks will be required to comply with a regulation that is intended to address a problem that they are not creating. Advocacy encourages the agencies to exempt small banks from this potentially costly requirement.

Effective Date of Compliance

In the proposal, the agencies state:

> "To reduce the burden on small banks, the proposed rule would provide small banks that opt into the general performance standards under proposed 12 CFR 25.09(b) and 345.09(b) as of the final rule's effective date and banks that no longer meet the definition of a small bank (1) two years after the rule's effective date or after the bank no longer meets the definition of a small bank to comply with the rule's assessment area, data collection, and recordkeeping requirements and (2) three years after the rule's effective date or after the bank no longer meets the definition of a small bank to comply with the rule's reporting requirements. However, small banks that choose to opt into the general performance standards under proposed §§ 25.09(b) and 345.09(b) after the effective date would receive (1) one year after the bank opts in to comply with the rule's assessment area, data collection, and recordkeeping requirements and (2) two years after the bank opts in to comply with the rule's reporting requirements."[25]

It is helpful for small entities to have additional time to comply with regulations. Indeed, section 603(c) of the RFA states that the establishment of a different timetable for small entities is an alternative that an agency can consider to mitigate the impact on small entities. However, the timetable suggested by the agencies is confusing. This rule is expensive. Small banks should be allowed a consistent three years to comply. Three years will minimize confusion and allow banks the time that need to comply with this costly regulation.

Conclusion

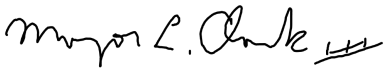
The CRA is an important tool to encourage depository institutions to meet the credit needs of the communities in which they operate, including low- and moderate-income neighborhoods. The current rules need clarification and updating. Advocacy appreciates the effort that the agencies are making to update and clarify the regulations. However, the proposed regulations will be unduly burdensome for small banks. Advocacy encourages the agencies to consider the

[24] Id. at 1228.
[25] Id.

alternatives outlined above as well as any additional alternatives that small banks may recommend.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact me or Assistant Chief Counsel Jennifer Smith at (202) 205-6943.

Sincerely,



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